

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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IN RE: C. A. NO. 01-47
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SPECIAL PROCEEDING NOVEMBER 4, 2004
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* 10:00 A. M.
*
* PROVIDENCE, RI
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BEFORE THE HONORABLE ERNEST C. TORRES
CHIEF DISTRICT JUDGE
(DECISION ON MOTION TO MODIFY CONTEMPT ORDER)

APPEARANCES:

SPECIAL PROSECUTOR: DESISTO LAW OFFICES
BY: MARC DESISTO, ESQUIRE
BY: JOAN MCPHEE, ESQUIRE
211 ANGELL STREET
PROVIDENCE, RI 02903

FOR MR. TARICANI: EDWARDS & ANGELL
BY: DEMING SHERMAN, ESQUIRE
ONE FINANCIAL CENTER
PROVIDENCE, RI 02903
- AND -
SUSAN WEINER, ESQUIRE
NBC, INC.
30 ROCKEFELLER PLAZA
10TH FLOOR EAST
NEW YORK, NY 10112

COURT REPORTER: ANGELA M GALLOGLY, RPR-FCRR

1 NOVEMBER 4, 2004 - 10:00 A.M

2 THE COURT: IT'S CLEAR TO THE COURT THAT THE
3 CIVIL CONTEMPT SANCTIONS PREVIOUSLY IMPOSED HAVE NOT
4 WORKED. MR. TARICANI OR SOMEONE ON HIS BEHALF HAS BEEN
5 PAYING THE CIVIL SANCTION OF \$1,000 A DAY SINCE AUGUST
6 12, AND MR. TARICANI STILL REFUSES TO ANSWER THE
7 QUESTIONS POSED BY THE SPECIAL PROSECUTOR. THAT LEAVES
8 THE COURT WITH THREE OPTIONS.

9 THE FIRST OPTION IS TO INCREASE THE CIVIL
10 PENALTY FOR CONTINUED DEFIANCE OF THE COURT'S ORDER, AS
11 THE SPECIAL PROSECUTOR IS SUGGESTING, IN THE HOPE THAT
12 SOMEHOW THIS WILL PERSUADE MR. TARICANI TO COMPLY WITH
13 THE COURT ORDER.

14 THE SECOND OPTION IS TO DROP THE MATTER, TO
15 CONCLUDE THAT MR. TARICANI WILL NOT COMPLY WITH THE
16 COURT ORDER EVEN IF THE DAILY SANCTION IS INCREASED AND
17 FORGET ABOUT THE FACT THAT HE HAS KNOWINGLY CONTINUED
18 TO VIOLATE A COURT ORDER, EVEN AFTER THAT ORDER HAS
19 BEEN UPHELD ON APPEAL, AND ALSO FORGET ABOUT THE FACT
20 THAT THE VIOLATION APPEARS TO HAVE DOOMED OR AT LEAST
21 SERIOUSLY UNDERMINED THE SPECIAL PROSECUTOR'S
22 INVESTIGATION INTO WHO VIOLATED THE PROTECTIVE ORDER, A
23 DIFFERENT COURT ORDER, THAT WAS ENTERED IN THE
24 SO-CALLED PLUNDER DOME CASES.

25 THE THIRD OPTION IS TO CONCLUDE THAT

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1 MR. TARICANI WILL NOT COMPLY WITH THIS COURT'S ORDER
2 THAT HE ANSWER THE QUESTIONS POSED BY THE SPECIAL
3 PROSECUTOR EVEN IF THE DAILY CIVIL SANCTION IS

4 INCREASED, BUT THAT A WILLFUL VIOLATION OF A LAWFUL
5 COURT ORDER CANNOT BE OVERLOOKED, ESPECIALLY WHEN IT
6 IMPEDES A CRIMINAL INVESTIGATION, AND, THEREFORE,
7 CONCLUDE THAT CRIMINAL CONTEMPT PROCEEDINGS SHOULD BE
8 INITIATED.

9 NOW, AS TO THE FIRST OPTION, THE OPTION TO
10 INCREASE THE AMOUNT OF THE CIVIL SANCTION, I REJECT
11 THAT OPTION AND I DO SO FOR TWO PRINCIPAL REASONS.
12 FIRST OF ALL, IT SEEMS FAIRLY CLEAR, AS MR. DESISTO HAS
13 SUGGESTED, THAT THE SANCTIONS ARE NOT BEING PAID BY
14 MR. TARICANI, THEY' RE BEING PAID BY SOMEONE ELSE,
15 PERHAPS CHANNEL 10 OR NBC, I DON' T KNOW, AND INCREASING
16 THE SANCTION WOULD BE BORNE BY THE WRONG PARTY HERE;
17 IT' S NOT CHANNEL 10 OR NBC OR ANYONE ELSE THAT' S
18 REFUSING TO COMPLY WITH THE ORDER, IT' S MR. TARICANI.
19 AND INCREASING THE SANCTION THAT, IF IT IS BEING BORNE
20 BY SOMEONE ELSE, WOULDN' T PROVIDE ANY INCENTIVE TO
21 MR. TARICANI TO COMPLY WITH THE COURT ORDER.

22 IF CHANNEL 10 OR NBC OR SOMEONE ELSE IS NOT
23 PAYING THE SANCTION OR STOPS PAYING THE SANCTION, IT' S
24 EXTREMELY DOUBTFUL THAT MR. TARICANI WOULD BE ABLE TO
25 PAY AN INCREASED SANCTION, WHICH WOULD BRING US RIGHT

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1 BACK TO WHERE WE STARTED. IT WOULD IMPOSE AN
2 IMPOSSIBLE FINANCIAL REQUIREMENT ON HIM AND WE' D BE
3 RIGHT BACK TO SQUARE 1. AND WHAT' S MORE, AS
4 MR. SHERMAN PROPERLY POINTS OUT, INCREASING THE
5 SANCTION, IF IT' S GOING TO BE BORNE BY MR. TARICANI
6 PERSONALLY, THEN MAKES THE TRANSITION INTO A PUNITIVE

7 SANCTION AS OPPOSED TO A CIVIL SANCTION DESIGNED TO
8 PERSUADE OR COERCE COMPLIANCE. AND IF PUNISHMENT IS
9 GOING TO BE METED OUT, IF WE'RE GOING TO GET INTO THE
10 AREA OF PUNITIVE ACTION, THEN THAT OUGHT TO BE DONE IN
11 THE CONTEXT OF A CRIMINAL CONTEMPT PROCEEDING, NOT
12 UNDER THE GUISE OF A CIVIL CONTEMPT SANCTION.

13 THE SECOND OPTION, DROPPING THE MATTER. IT HAS
14 BEEN ARGUED IN THIS CASE AND BY OTHER OBSERVERS THAT
15 THE COURT OUGHT TO DROP THE MATTER; THAT MR. TARICANI
16 SHOULD NOT BE REQUIRED TO ANSWER THE SPECIAL
17 PROSECUTOR'S QUESTIONS, BECAUSE IT'S NOT IMPORTANT TO
18 FIND OUT WHO GAVE THE TAPE TO MR. TARICANI, AND IT
19 DOESN'T MATTER THAT THE TAPE WAS PROVIDED IN VIOLATION
20 OF THE PROTECTIVE ORDER ENTERED IN THE SO-CALLED
21 PLUNDER DOME CASES BECAUSE AIRING THE TAPE, APPARENTLY
22 DID NOT, AFTER ALL, PREVENT A FAIR TRIAL FOR THE
23 PARTIES IN THAT CASE. ANOTHER ARGUMENT MADE IS THAT
24 ATTEMPTING TO COMPEL MR. TARICANI TO ANSWER THE SPECIAL
25 PROSECUTOR'S QUESTIONS WILL DETER CONFIDENTIAL SOURCES

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1 IN THE FUTURE FROM PROVIDING INFORMATION TO REPORTERS.
2 NOW, AS TO THE FIRST ARGUMENT THAT IT'S NOT
3 IMPORTANT AND IT DOESN'T MATTER, THAT ARGUMENT, IN MY
4 VIEW, REVEALS EITHER A FUNDAMENTAL MISUNDERSTANDING OF
5 THE ISSUE OR A DISTURBING DISREGARD FOR THE FOUNDATIONS
6 OF THE RULE OF LAW. AND IT'S MY DUTY TO TELL YOU THAT
7 IT IS IMPORTANT TO FIND OUT WHO GAVE THE TAPE TO
8 MR. TARICANI BECAUSE IN GIVING THE TAPE TO HIM, THAT
9 PERSON APPARENTLY VIOLATED A COURT ORDER AND APPARENTLY
10 DID SO FOR THE PURPOSE OF EITHER COMPROMISING AN

11 ONGOING GRAND JURY INVESTIGATION OR DEPRIVING THE
 12 PARTIES IN THE PLUNDER DOME CASES OF THEIR
 13 CONSTITUTIONAL RIGHTS TO A FAIR TRIAL. IT DOES MATTER
 14 THAT THE PERSON WHO PROVIDED THE TAPE TO MR. TARICANI
 15 APPARENTLY DID SO IN DIRECT VIOLATION OF THE PROTECTIVE
 16 ORDER PREVIOUSLY ENTERED IN THE PLUNDER DOME CASES. IT
 17 MATTERS BECAUSE CONDONING OR IGNORING THE VIOLATION OF
 18 COURT ORDERS, WOULD UNDERMINE THE VERY FOUNDATION OF
 19 RULE OF LAW ON WHICH OUR SYSTEM OF GOVERNMENT RESTS.
 20 PROTECTIVE ORDERS ARE DESIGNED TO PREVENT
 21 COMPROMISING CRIMINAL INVESTIGATIONS, OR TO PROTECT THE
 22 CONSTITUTIONAL RIGHTS OF INDIVIDUALS ACCUSED OF A
 23 CRIME, TO A FAIR TRIAL. AND SUCH ORDER WOULD BE
 24 RENDERED VIRTUALLY MEANINGLESS IF VIOLATIONS OF THOSE
 25 ORDERS ARE SIMPLY IGNORED. IF THAT WERE THE CASE,

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1 PERSONS WANTING TO DO THOSE THINGS COULD DO SO WITH
 2 IMPUNITY, ALL THEY WOULD HAVE TO DO IS PROVIDE THE
 3 INFORMATION TO A REPORTER UNDER PROMISE OF
 4 CONFIDENTIALITY, AND THEY COULD DO SO SECURE IN THE
 5 KNOWLEDGE THAT IT WOULD BE IMPOSSIBLE TO IDENTIFY THEM,
 6 BECAUSE THE REPORTER WOULD BE THE ONLY ONE IN A
 7 POSITION TO DO SO.

8 NOT ONLY WOULD IT RENDER MEANINGLESS PROTECTIVE
 9 ORDERS, BUT IT WOULD ALSO UNDERMINE THE ROLE THAT ALL
 10 KINDS OF COURT ORDERS PLAY IN THE RULE OF LAW. ONCE WE
 11 BEGIN SENDING THE MESSAGE THAT IN SOME CASES THERE MAY
 12 NOT BE ANY CONSEQUENCES ATTACHED TO WILLFULLY VIOLATING
 13 COURT ORDERS, OTHERS WILL BE EMBOLDENED TO DO THE SAME

14 THING AND COURT ORDERS WILL LOSE SOME OF THEIR MEANING
15 AND AS RESULT, RESPECT FOR THE LAW IN GENERAL, WILL BE
16 DIMINISHED.

17 THE FACT THAT THE RELEASE OF THE TAPE APPARENTLY
18 DID NOT ACTUALLY COMPROMISE THE ONGOING GRAND JURY
19 INVESTIGATION, OR THAT IT DID NOT APPARENTLY VIOLATE
20 THE DEFENDANTS' RIGHTS TO A FAIR TRIAL IN THE PLUNDER
21 DOME CASES, DOES NOT PROVIDE A REASON FOR IGNORING THE
22 VIOLATION. IT DOESN'T PROVIDE A REASON FOR IGNORING
23 THE VIOLATION OF THE PROTECTIVE ORDER ANY MORE THAN THE
24 FACT THAT A MURDER ATTEMPT WAS UNSUCCESSFUL PROVIDES A
25 REASON FOR IGNORING THE ATTEMPTED MURDER.

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1 NOW, FOR SOME OF THE SAME REASONS THAT I HAVE
2 JUST MENTIONED, IT ALSO DOES MATTER THAT MR. TARICANI
3 HIMSELF HAS VIOLATED THE COURT ORDER DIRECTING HIM TO
4 ANSWER THE SPECIAL PROSECUTOR'S QUESTIONS. IF
5 MR. TARICANI CAN REFUSE TO ANSWER QUESTIONS RELEVANT TO
6 A CRIMINAL INVESTIGATION AFTER HAVING BEEN ORDERED TO
7 DO SO BY A COURT, EVERY OTHER CITIZEN WOULD HAVE THAT
8 RIGHT. THE COURT WOULD BE VERY HARD-PRESSED TO JUSTIFY
9 IMPRISONING OR TAKING ANY OTHER ACTION AGAINST THE NEXT
10 PERSON WHO REFUSES TO TESTIFY BEFORE A GRAND JURY OR
11 REFUSES TO PROVIDE THE GRAND JURY WITH SUBPOENAED
12 DOCUMENTS, BECAUSE THAT PERSON MIGHT FEEL THAT THE
13 INFORMATION IS CONFIDENTIAL OR MAY HAVE PROMISED
14 SOMEONE THAT HE OR SHE WOULDN'T PROVIDE THAT
15 INFORMATION. IT'S NOT DIFFICULT TO ENVISION THE
16 ADVERSE EFFECT THAT THIS WOULD HAVE ON THE
17 ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM AND THE

18 PUBLIC'S INTEREST IN SEEING THAT THOSE WHO COMMIT
19 CRIMINAL ACTS ARE APPREHENDED AND HELD ACCOUNTABLE.

20 IN ADDITION, MR. TARICANI'S REFUSAL MATTERS
21 BECAUSE IT HAS PROTRACTED, HAMSTRUNG AND MAY HAVE
22 ACTUALLY DEFEATED THE SPECIAL PROSECUTOR'S EFFORTS TO
23 IDENTIFY AND PROSECUTE THE PERSON OR PERSONS WHO
24 VIOLATED THE PROTECTIVE ORDERS IN THE PLUNDER DOME
25 CASES. THIS INVESTIGATION HAS BEEN UNDERWAY FOR

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1 APPROXIMATELY THREE YEARS. THE SPECIAL PROSECUTOR HAS
2 MADE CONSIDERABLE EFFORTS, WHICH I'M NOT PRESENTLY AT
3 LIBERTY TO DISCLOSE, THOUGH I KNOW ABOUT THEM, HE HAS
4 MADE CONSIDERABLE EFFORTS TO TRY TO IDENTIFY THE
5 VIOLATOR OF THE PROTECTIVE ORDER WITHOUT HAVING TO ASK
6 MR. TARICANI TO IDENTIFY HIS SOURCE. THOSE EFFORTS
7 HAVE BEEN UNSUCCESSFUL.

8 IF THE INFORMATION THAT MR. TARICANI NOW REFUSES
9 TO PROVIDE HAD BEEN PROVIDED WHEN REQUESTED AND WHEN
10 ORDERED BY THIS COURT, THE INVESTIGATION WOULD HAVE
11 BEEN CONCLUDED LONG AGO. BECAUSE OF MR. TARICANI'S
12 CONTINUED REFUSAL, THE INVESTIGATION, AS I SAY, HAS AT
13 LEAST BEEN PROTRACTED AND IMPEDED AND MAY HAVE BEEN
14 TOTALLY DOOMED.

15 WITH RESPECT TO THE ARGUMENT THAT REQUIRING
16 MR. TARICANI TO ANSWER WILL DETER CONFIDENTIAL SOURCES
17 FROM PROVIDING INFORMATION TO REPORTERS IN THE FUTURE,
18 I'M NOT GOING TO REPEAT WHAT'S BEEN SAID PREVIOUSLY.
19 THAT ARGUMENT WAS DEALT WITH AT GREAT LENGTH BY THE
20 UNITED STATES SUPREME COURT IN BRANZBURG AND BY THIS

21 COURT, BOTH IN ITS OCTOBER 2, 2003 MEMORANDUM AND ORDER
22 GRANTING THE SPECIAL PROSECUTOR'S MOTION TO COMPEL
23 MR. TARICANI TO ANSWER THESE QUESTIONS AND IN THE MARCH
24 16 BENCH DECISION THIS YEAR WITH RESPECT TO THE CIVIL
25 CONTEMPT ISSUE. AND THERE'S NO POINT, AS I SAY, IN

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1 REPEATING WHAT WAS SAID. I WOULD SUGGEST THAT ANYONE
2 WHO HASN'T HAD THE OPPORTUNITY TO READ THOSE DECISIONS
3 AND IS INTERESTED OUGHT TO DO SO; THE MEMORANDUM AND
4 ORDER WAS PUBLISHED. AND BOTH THE MEMORANDUM AND ORDER
5 AND A TRANSCRIPT OF THE BENCH DECISION ON MARCH 16 WERE
6 POSTED AND STILL ARE POSTED, I BELIEVE, ON THE COURT'S
7 WEBSITE. AND, IN FACT, A TRANSCRIPT OF THE COURT'S
8 DECISION THIS MORNING ALSO WILL BE POSTED ON THE
9 COURT'S WEBSITE, PROBABLY SOMETIME AROUND NOON, MAYBE A
10 LITTLE BEFORE, DEPENDING ON HOW QUICKLY THE REPORTER
11 CAN PREPARE IT. AND I'M DOING THAT BECAUSE I THINK THE
12 ISSUES HERE ARE VERY IMPORTANT, AND I BELIEVE THAT IT'S
13 IMPORTANT THAT EVERYONE UNDERSTAND WHAT THE ISSUES ARE,
14 AND THAT EVERYONE UNDERSTAND WHAT THE COURT'S REASONS
15 ARE FOR THE ACTIONS THAT WILL BE TAKEN THIS MORNING.

16 BUT GETTING BACK TO THE QUESTION, I WILL SAY
17 THIS, FOR THE PRESENT PURPOSES, ANYWAY, ABOUT THE
18 DETERRENT EFFECT THAT ANSWERING THESE QUESTIONS WILL
19 CAUSE, I WOULD SIMPLY POINT OUT THAT IN THIS CASE
20 REQUIRING MR. TARICANI TO IDENTIFY HIS SOURCE MIGHT
21 VERY WELL DETER SOME FUTURE SOURCES WHO COMMIT CRIMINAL
22 ACTS IN OBTAINING OR PRESENTING INFORMATION TO A
23 REPORTER, BUT THAT SHOULDN'T APPRECIABLY LIMIT A
24 REPORTER'S ABILITY TO GATHER NEWS BECAUSE, PRESUMABLY,

25 OR AT LEAST, HOPEFULLY, SUCH INDIVIDUALS DON'T MAKE UP

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1 A SIGNIFICANT PERCENTAGE OF A REPORTER'S SOURCES. AND
2 IN ANY EVENT WHETHER THEY DO OR NOT, CRIMINAL CONDUCT
3 OF THAT KIND SHOULD NOT BE CONDONED BY ALLOWING THE
4 PERPETRATOR OF THAT KIND OF CONDUCT TO USE A REPORTER'S
5 CLAIM OF CONFIDENTIALITY AS A SHIELD THAT PREVENTS THE
6 SOURCE FROM BEING HELD ACCOUNTABLE FOR HIS CRIMINAL
7 ACTS. SO FOR ALL THOSE REASONS I REJECT OPTION NUMBER
8 2.

9 THAT LEAVES US WITH OPTION NUMBER 3 AS THE ONLY
10 APPROPRIATE COURSE HERE. AND WHILE THE PROSPECT OF
11 PUNISHING MR. TARICANI FOR CRIMINAL CONTEMPT IS A VERY
12 UNPALATABLE ONE TO ME PERSONALLY, AS I'VE SAID BEFORE,
13 BECAUSE AS I'VE SAID BEFORE, I HAVE GREAT RESPECT FOR
14 MR. TARICANI BOTH AS A JOURNALIST AND FROM ANY LIMITED
15 ACQUAINTANCESHIP WITH HIM AS AN INDIVIDUAL. I ALSO
16 BELIEVE, BASED ON WHAT I KNOW AT THIS POINT, THAT HE
17 HAS CONTINUED TO DEFY THE COURT'S ORDER BECAUSE HE
18 THINKS SOMEHOW THAT THIS PROMOTES A PRINCIPLE THAT HE
19 VIEWS AS MORE IMPORTANT THAN THE ONES THAT I HAVE JUST
20 DESCRIBED.

21 BUT AS I'VE SAID BEFORE, NEITHER MY RESPECT FOR
22 MR. TARICANI OR THE JOB THAT HE DOES OR HIS STATUS AS A
23 JOURNALIST OR THE PURITY, OR APPARENT PURITY OF HIS
24 MOTIVES, PLACES HIM ABOVE THE LAW OR EXCUSES HIS
25 VIOLATION OF THE COURT ORDER, SO I'M DUTY BOUND TO TAKE

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1 APPROPRIATE ACTION AND MR. TARICANI HAS LEFT ME WITH NO
2 CHOICE AS TO WHAT THAT COURSE OF ACTION MUST BE. IT
3 MUST TAKE THE FORM OF A CRIMINAL CONTEMPT PROCEEDING.

4 AND, MR. TARICANI, BEFORE I SET THE DATE FOR THE
5 CRIMINAL CONTEMPT HEARING, I WANT TO URGE YOU TO
6 RECONSIDER YOUR POSITION. AND THIS MAY BE YOUR LAST
7 OPPORTUNITY TO DO SO. IT'S STILL WITHIN YOUR POWER TO
8 END THIS MATTER BY COMPLYING WITH THE COURT'S ORDER AND
9 ANSWERING THE SPECIAL PROSECUTOR'S QUESTIONS. IF
10 YOU'RE FOUND GUILTY OF CRIMINAL CONTEMPT, IT WILL NO
11 LONGER BE WITHIN YOUR POWER, IT WILL BE TOO LATE TO
12 AVOID ANY PENALTY BY THEN AGREEING TO COMPLY WITH THE
13 COURT ORDER. JUST AS SOMEONE WHO EMBEZZLES MONEY AND
14 IS GIVEN AN OPPORTUNITY TO AVOID PROSECUTION BY
15 RETURNING IT REFUSES AND IS LATER FOUND GUILTY OF
16 EMBEZZLEMENT, THAT PERSON CAN'T AVOID PUNISHMENT FOR
17 THE CRIMINAL ACT BY THEN DECIDING TO RETURN THE MONEY.
18 I KNOW THAT'S CERTAINLY NOT A PERFECT ANALOGY BUT IT'S
19 ABOUT AS CLOSE AS I CAN COME TO TRY TO ILLUSTRATE THE
20 POINT.

21 SO CRIMINAL CONTEMPT, AS I THINK I'VE SAID
22 BEFORE AND I HOPE YOU UNDERSTAND NOW, DIFFERS FROM
23 CIVIL CONTEMPT, IN THE SENSE THAT IN CIVIL CONTEMPT,
24 THE PARTY WHO IS HELD IN CIVIL CONTEMPT HAS THE
25 OPPORTUNITY TO PURGE HIMSELF OF CONTEMPT BY COMPLYING

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1 WITH THE ORDER, OR AS THE CASES SOMETIMES SAY, THAT
2 PARTY HAS THE KEYS TO THE JAILHOUSE IN HIS POCKET.

3 CRIMINAL CONTEMPT IS NOT LIKE THAT. IN CRIMINAL
4 CONTEMPT, ONCE AN INDIVIDUAL IS HELD IN CRIMINAL
5 CONTEMPT, IT'S TOO LATE TO THEN OFFER TO COMPLY.

6 NOW, IF IT HASN'T BEEN APPARENT TO YOU SINCE
7 1972 WHEN THE SUPREME COURT DECIDED BRANZBURG, I THINK
8 IT SHOULD BE APPARENT TO YOU NOW THAT YOU HAVE NO LEGAL
9 RIGHT TO REFUSE TO ANSWER THE SPECIAL PROSECUTOR'S
10 QUESTIONS, AND YOU CERTAINLY HAVE NO LEGAL OR OTHER
11 RIGHT TO DISOBEY LAWFUL COURT ORDERS. AND I CAN THINK
12 OF ONLY TWO POSSIBLE REASONS WHY YOU HAVE PERSISTED IN
13 YOUR REFUSAL TO ANSWER THE SPECIAL PROSECUTOR'S
14 QUESTIONS. ONE IS THAT YOU MAY BELIEVE THAT DESPITE
15 WHAT THE LAW SAYS, A REPORTER SHOULD HAVE THE PRIVILEGE
16 TO REFUSE TO IDENTIFY CONFIDENTIAL SOURCES. THE ONLY
17 OTHER REASON I COULD THINK OF IS THAT YOU PROMISED THE
18 SOURCE THAT YOU WOULD NOT REVEAL HIS OR HER IDENTITY,
19 AND EVEN IF YOU HAD NO RIGHT TO MAKE THAT PROMISE OR
20 YOU NOW RECOGNIZE THAT THAT WAS AN IMPROVIDENT PROMISE,
21 THAT YOU FEEL BOUND TO KEEP IT.

22 NOW, IF THESE ARE YOUR REASONS, I WOULD LIKE TO
23 OFFER YOU SOME THOUGHTS THAT YOU MAY WANT TO CONSIDER
24 BETWEEN NOW AND THE TIME OF THE CRIMINAL CONTEMPT
25 HEARING, WHICH I HOPE AFTER YOU'VE HAD A CHANCE TO MULL

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1 THESE OVER, YOU MAY SEE FIT TO CHANGE YOUR MIND, WITH
2 RESPECT TO THE FIRST REASON THAT NO MATTER WHAT THE LAW
3 SAYS A REPORTER SHOULD HAVE THE RIGHT TO REFUSE TO
4 IDENTIFY CONFIDENTIAL SOURCES, I DON'T THINK YOU CAN
5 POSSIBLY BELIEVE THAT A REPORTER EVEN SHOULD HAVE THE
6 ABSOLUTE RIGHT TO REFUSE TO EVER IDENTIFY ANY SOURCE

7 THAT THE REPORTER DEEMS CONFIDENTIAL. I THINK THAT IF
 8 YOU THINK ABOUT IT THAT EVEN YOU MIGHT AGREE THAT
 9 THAT'S A BIT MUCH. IT SHOULD BE PRETTY EASY TO IMAGINE
 10 CIRCUMSTANCES UNDER WHICH A REPORTER SHOULD NOT HAVE
 11 SUCH A RIGHT, BECAUSE THE PUBLIC INTEREST SERVED OR THE
 12 CONSTITUTIONAL RIGHTS OF OTHER PERSONS THAT WOULD BE
 13 PROTECTED BY DISCLOSING THE IDENTITY OF THE SOURCE,
 14 OUTWEIGH ANY FIRST AMENDMENT OR PUBLIC INTEREST SERVED
 15 BY KEEPING THAT PERSON'S IDENTITY A SECRET IN ORDER TO
 16 ENCOURAGE OTHERS TO COME FORWARD IN THE FUTURE. AND,
 17 AGAIN, I SUPPOSE ONE CAN THINK OF ALL KINDS OF EXAMPLES
 18 WHICH MAY NOT BE COMPLETELY ANALOGOUS. FOR EXAMPLE,
 19 SUPPOSE SOME SOURCE PROVIDED YOU WITH A VIDEOTAPE OF A
 20 CHILD WHO HAD BEEN KIDNAPPED AS PART OF THE PERSON
 21 WANTING TO GET THIS PUBLICIZED TO SHOW THAT THE CHILD
 22 WAS STILL ALIVE AND TO PUT PRESSURE ON WHOEVER THEY
 23 WERE TRYING TO GET RANSOM FROM TO PAY THE RANSOM I
 24 WOULD THINK THAT EVEN YOU WOULD RECOGNIZE THAT IN THAT
 25 CASE IT WOULD NOT BE PROPER FOR THE REPORTER TO KEEP

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1 THE IDENTITY OF THE PERSON PROVIDING HIM THAT TAPE, WHO
 2 WOULD PRESUMABLY HAVE KNOWLEDGE OF WHERE THAT CHILD
 3 MIGHT BE OR WHO TOOK THE CHILD, TO KEEP THAT
 4 INFORMATION CONFIDENTIAL. AND I SUPPOSE THE NUMBER OF
 5 EXAMPLES ONE CAN THINK UP IS ONLY LIMITED BY
 6 IMAGINATION. I'LL LEAVE IT TO YOU TO THINK ABOUT THAT.

7 A SECOND POINT THAT I WOULD SUGGEST YOU CONSIDER
 8 IS THAT IDENTIFYING THE SOURCE IN THIS CASE DOESN'T
 9 MEAN THAT YOU WOULD BE REQUIRED TO DISCLOSE THE

10 IDENTITY OF CONFIDENTIAL SOURCES IN ALL CASES. AS I'M
11 SURE YOU KNOW, A REPORTER, GENERALLY, HAS NO LEGAL
12 OBLIGATION TO REVEAL THE IDENTITY OF THE SOURCE UNLESS
13 A COURT ORDERS THAT HE DO SO, AND COURTS DON'T ISSUE
14 THESE ORDERS CAVALIERLY OR AS A MATTER OF COURSE.
15 COURTS ARE RELUCTANT TO REQUIRE REPORTERS TO
16 IDENTIFY THEIR CONFIDENTIAL SOURCES AND GENERALLY DO SO
17 ONLY IF THERE IS A GOOD AND COMPELLING REASON FOR
18 ORDERING IT. SO THE FACT THAT IN A PARTICULAR CASE THE
19 SOURCE MUST BE DISCLOSED DOESN'T MEAN THAT SOURCES MUST
20 BE DISCLOSED IN ALL CASES.
21 THIS CASE, I THINK, IS A GOOD EXAMPLE, IT
22 INVOLVES SOME VERY UNIQUE CIRCUMSTANCES THAT PROVIDE
23 WHAT I VIEW AS COMPELLING REASONS FOR IDENTIFYING THE
24 SOURCE. THIS IS NOT ONLY A CRIMINAL CASE, IT'S ALSO A
25 CASE IN WHICH THE SOURCE, APPARENTLY, WAS THE

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1 PERPETRATOR OF A CRIMINAL ACT, AND IT'S A CASE IN WHICH
2 THE CRIMINAL ACT WAS THE SOURCE'S VERY ACT IN PROVIDING
3 THE TAPE TO YOU. SO THIS CASE IS SIGNIFICANTLY
4 DIFFERENT FROM THE RUN-OF-THE-MILL CASE.

5 ANOTHER THING YOU MAY WANT TO CONSIDER IS
6 WHETHER YOU WANT TO ENCOURAGE OTHER POTENTIAL SOURCES
7 WHO MAY HAVE AN AXE TO GRIND AND MAY WANT TO USE THE
8 MEDIA TO GRIND THAT AXE TO COMMIT CRIMINAL ACTS IN
9 ORDER TO OBTAIN OR PROVIDE YOU WITH INFORMATION SO THAT
10 THEY CAN ACHIEVE WHATEVER THEIR OBJECTIVE MAY HAPPEN TO
11 BE.

12 THIS IS NOT A CASE WHERE WE HAVE AN INDIVIDUAL
13 OR SOURCE WITH LOFTY MOTIVES OF EXPOSING CORRUPTION OR

14 WRONGDOING THAT OTHERWISE MIGHT GO UNDETECTED. IT'S
 15 NOT A CASE WHERE THAT INFORMATION WAS LAWFULLY PROVIDED
 16 TO THE REPORTER AND WAS PROVIDED BECAUSE THE SOURCE
 17 BELIEVED THAT THE AUTHORITIES CHARGED WITH THE
 18 RESPONSIBILITY FOR INVESTIGATING AND PROSECUTING THE
 19 WRONGDOING WERE EITHER UNABLE OR UNWILLING TO ACT. NOR
 20 IS IT A CASE WHERE THE SOURCE WANTS CONFIDENTIALITY
 21 BECAUSE THE SOURCE HAS SOME LEGITIMATE REASON FOR
 22 WISHING TO REMAIN ANONYMOUS, SUCH AS FEAR OF
 23 RETALIATION OR WHATEVER.

24 IN THIS CASE, THE MOTIVE WAS TO COMPROMISE AN
 25 ONGOING GRAND JURY INVESTIGATION, OR ALTERNATIVELY, AND

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1 I THINK PROBABLY MORE LIKELY, TO DEPRIVE THE PARTIES IN
 2 A CRIMINAL PROSECUTION OF THEIR CONSTITUTIONAL RIGHT TO
 3 A FAIR TRIAL BY ATTEMPTING TO POISON THE JURY POOL. IN
 4 THIS CASE THE TAPE WAS NOT LAWFULLY PROVIDED TO YOU.
 5 IT WAS PROVIDED TO YOU ILLEGALLY AND UNLAWFULLY. IN
 6 THIS CASE THE AUTHORITIES WERE, IN FACT, INVESTIGATING
 7 AND PROSECUTING THE WRONGDOING THAT WAS PURPORTEDLY
 8 DEPICTED ON THE TAPE. ONE OF THE PROSECUTIONS WAS WELL
 9 UNDERWAY AND THE AUTHORITIES WERE USING THIS TAPE
 10 ALREADY AS EVIDENCE IN THOSE PROSECUTIONS. IN FACT,
 11 THEY HAD MADE THE TAPES DURING THE COURSE OF THE
 12 INVESTIGATION. AND IN THIS CASE THE REASON THAT THE
 13 SOURCE DESIRES ANONYMITY IS NOT SOME LEGITIMATE REASON
 14 INVOLVING SOMETHING SUCH AS RETALIATION, BUT, RATHER,
 15 IT'S AN OBVIOUS ATTEMPT TO AVOID PROSECUTION FOR WHAT
 16 THE SOURCE CLEARLY RECOGNIZED WAS A CRIMINAL ACT.

17 WITH RESPECT TO THE SECOND POSSIBLE REASON YOU
18 MIGHT HAVE, THE DESIRE TO OR THE FEELING THAT YOU' RE
19 OBLIGED TO ABIDE BY THE PROMISE THAT YOU MADE, I GUESS
20 THE FIRST QUESTION IS WHAT WAS THAT PROMISE? ONLY YOU
21 KNOW. DID YOU PROMISE NOT TO REVEAL THIS INFORMATION
22 EVEN IF YOU WERE ORDERED BY A COURT TO DO SO? AND IF
23 NOT, IS IT REASONABLE FOR THE SOURCE TO EXPECT YOU TO
24 DEFY A COURT ORDER AND FACE THE PROSPECT OF GOING TO
25 JAIL AFTER YOU VIGOROUSLY CONTESTED THE ORDER, IT' S NOT

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1 AS THOUGH YOU WOULD HAVE REVEALED THE INFORMATION AT
2 FIRST REQUEST, YOU' VE DONE ABOUT EVERYTHING HUMANLY
3 POSSIBLE TO CHALLENGE THE ORDER. YOU, OR SOMEONE ON
4 YOUR BEHALF, HAS BEEN PAYING A THOUSAND DOLLARS A DAY
5 AS A CIVIL SANCTION. IS IT REASONABLE FOR THE SOURCE
6 TO EXPECT ANY MORE IN THE ABSENCE OF SOME EXPRESSED
7 PROMISE THAT YOU WOULDN' T REVEAL THE IDENTITY OF THE
8 SOURCE EVEN IF ORDERED BY A COURT TO DO SO.

9 ANOTHER QUESTION YOU MIGHT MULL OVER IS DID THE
10 SOURCE TELL YOU AT THE TIME THE TAPE WAS PROVIDED THAT
11 IT WAS BEING PROVIDED IN VIOLATION OF A COURT ORDER. I
12 ASSUME THE ANSWER TO THAT IS NO, BUT THAT' S AN ISSUE
13 THAT WE MAY GET INTO LATER IN THESE PROCEEDINGS. AND
14 IF THE SOURCE DIDN' T LEVEL WITH YOU BY TELLING YOU
15 THAT, WHAT OBLIGATION DO YOU HAVE TO THE SOURCE? WHAT
16 RIGHT DOES THE SOURCE HAVE TO EXPECT YOU TO KEEP HIS OR
17 HER IDENTITY A SECRET WHEN THE SOURCE' S FAILURE TO
18 DISCLOSE THIS INFORMATION IS WHAT' S GOTTEN YOU INTO
19 THIS PREDICAMENT.

20 ANOTHER QUESTION YOU MIGHT CONSIDER IS WHETHER

21 YOU OUGHT TO AT LEAST APPROACH THE SOURCE TO INQUIRE
 22 WHETHER THE SOURCE EXPECTS YOU TO CONTINUE KEEPING HIS
 23 OR HER IDENTITY A SECRET. I DON'T KNOW WHETHER YOU'VE
 24 DONE THAT YET OR NOT, BUT IT'S CERTAINLY SOMETHING THAT
 25 OUGHT TO BE CONSIDERED.

18

1 AND THE FINAL THING TO CONSIDER IS WHETHER THE
 2 SOURCE IS DESERVING OF THIS PROTECTION. WHAT KIND OF A
 3 PERSON WOULD SIT BACK AND REMAIN SILENT WHILE YOU FACE
 4 THE PROSPECT OF BEING FOUND GUILTY OF CRIMINAL
 5 CONTEMPT.

6 NOW, MR. SHERMAN REFERRED TO SOME OF THE OTHER
 7 CASES THAT ARE PENDING IN THE DISTRICT OF COLUMBIA. IN
 8 ONE OF THOSE CASES THE SOURCE CAME FORWARD WHEN IT
 9 BECAME CLEAR THAT THE REPORTER WAS GOING TO BE
 10 SANCTIONED FOR CRIMINAL CONTEMPT, THE SOURCE CAME
 11 FORWARD AND IDENTIFIED HIMSELF; FACED THE MUSIC.

12 WHILE THESE ARE THINGS THAT I WOULD HOPE YOU
 13 WOULD CONSIDER, THE DECISION, OBVIOUSLY, IS YOURS. AS
 14 I SAID, AT THIS POINT YOU STILL HAVE THE POWER, YOU
 15 HAVE IT WITHIN YOUR POWER TO END THIS MATTER, BUT YOU
 16 MAY NOT HAVE THAT POWER MUCH LONGER.

17 SO I'LL CONCLUDE, MR. TARICANI, BY SAYING THAT
 18 YOU ARE HEREBY ORDERED TO APPEAR IN THIS COURTROOM AT
 19 10 A.M. ON THURSDAY, NOVEMBER 18, FOR A TRIAL TO
 20 DETERMINE WHETHER YOU SHOULD BE FOUND GUILTY OF
 21 CRIMINAL CONTEMPT DUE TO YOUR REFUSAL TO ANSWER THE
 22 SPECIAL PROSECUTOR'S QUESTIONS REGARDING THE SOURCE
 23 FROM WHOM YOU OBTAINED THE SO-CALLED CORRENTE TAPE

24 DESPITE THE FACT THAT YOU WERE ORDERED TO DO SO BY THIS
25 COURT ON OCTOBER 2, 2003.

19

1 I WILL SAY THAT IF YOU ARE FOUND GUILTY, THE
2 COURT DOES NOT INTEND TO IMPOSE A FINE, AND ANY PRISON
3 SENTENCE THAT THE COURT IMPOSES WILL NOT EXCEED SIX
4 MONTHS.

5 IN THE MEANTIME, I'M RELEASING YOU ON PERSONAL
6 RECOGNIZANCE PENDING YOUR APPEARANCE ON NOVEMBER 18.

7 DO YOU HAVE ANYTHING FURTHER, MR. DESISTO?

8 MR. DESISTO: I DO NOT.

9 THE COURT: MR. SHERMAN?

10 MR. SHERMAN: YOUR HONOR, MAY I INQUIRE AS TO
11 THE STATUS OF THE CURRENT SANCTION? IS THAT NOW
12 SUSPENDED IN VIEW OF THE ACTION OF THE COURT OR IS THAT
13 TO CONTINUE?

14 THE COURT: DO YOU HAVE ANYTHING TO SAY ON THAT,
15 MR. DESISTO?

16 MR. DESISTO: I'D LIKE IT TO CONTINUE UP UNTIL
17 THE TIME OF THE TRIAL.

18 MR. SHERMAN: OBVIOUSLY I WOULD HAVE A DIFFERENT
19 VIEW, BUT WHAT IS THE COURT'S VIEW?

20 THE COURT: WELL, I HADN'T REALLY THOUGHT ABOUT,
21 THAT MR. SHERMAN. I WOULD SAY THAT IT WOULD HAVE TO BE
22 SUSPENDED BECAUSE THE COURT HAS CONCLUDED HERE THAT THE
23 SANCTION IS NOT ACCOMPLISHING ANYTHING, SO THERE'S NO
24 POINT IN CONTINUING IT PENDING THE CRIMINAL
25 PROSECUTION. THIS HAS NOW BECOME A MATTER OF CRIMINAL

20

1 CONCEPT.

2 SO THE SANCTION IS SUSPENDED AS OF NOW.

3 MR. SHERMAN: THANK YOU.

4 THE COURT: COURT WILL BE IN RECESS.

5 (ADJOURNED 10: 46 A. M)

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